

No. PD-0712-16

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/13/2017
DEANA WILLIAMSON, CLERK

ROBERT MONTE PRICHARD,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Dallas County

* * * * *

**STATE PROSECUTING ATTORNEY'S
MOTION FOR REHEARING**

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii-iii
GROUND FOR REHEARING.....	3
This Court infringed upon the Legislature’s prerogative in holding that a deadly weapon finding cannot be made in cases in which a person kills an animal in violation of Texas Penal Code Sections 42.092. This extra-judicial assertion of authority has severe consequences for the offense of cruelty to animals beyond the deadly weapon suitability issue.	
ARGUMENT.....	3-13
1. Does the cruelty to non-livestock animals statute authorize convictions for killing insects? Certainly not, despite the Court’s indication that it does.. . . .	3-6
2. “Serious Bodily Injury” is now undefined for purposes of Section 42.029.. . . .	6-7
3. The offense elements do not negate the applicability of a deadly weapon finding.	7-8
4. The Court improperly supplanted the Legislature’s value judgment.. . . .	8-11
5. This decision is out of step with other courts.. . . .	11-12
6. Conclusion.. . . .	12-13
PRAYER FOR RELIEF.	14
CERTIFICATE OF COMPLIANCE	15
CERTIFICATE OF SERVICE.	16

INDEX OF AUTHORITIES

Cases

<i>Bruno v. Milwaukee County</i> , 660 N.W.2d 656 (Wis. 2003).	1, 2 n.1
<i>Green v. State</i> , 476 S.W.3d 440 (Tex. Crim. App. 2015).	6, 7
<i>Commonwealth v. Hackenberger</i> , 836 A.2d 2 (Pa. 2003).	11
<i>Lawrence v. State</i> , 240 S.W.3d 912 (Tex. Crim. App. 2007).	5
<i>Narron v. State</i> , 835 S.W.3d 643 (Tex. Crim. App. 1992).	11 n.8
<i>People v. Smith</i> , 150 Cal. App. 4th 89 (Cal. App. 4th Dist. 2007).	12
<i>Whatley v. State</i> , 946 S.W.2d 73 (Tex. Crim. App. 1997).	11

Statutes

CAL. PENAL CODE § 12022(b)(1).	11-12
204 PA. CODE. § 303.10(a)(2).	11
TEX. PENAL CODE § 1.07(17)(B).	6
TEX. PENAL CODE Chapters 8 and 9.	8 n.6
TEX. PENAL CODE § 12.35(c)(1).	11
TEX. PENAL CODE § 42.092(a)(2).	5

Legislative History

Bill Analysis Accompanying H.B. 653 (77th Leg.), available at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=77R&Bill=HB653	13
---	----

Hearings on Tex. H.B. 653 Before the House Committee on Criminal Jurisprudence (77th Leg.) (Apr. 24, 2001), *available at* http://tlchouse.granicus.com/MediaPlayer.php?view_id=21&clip_id=7664 at 2:46:24 to 2:48:09. 10

S.B. Nos. 762, 1232 (85th Leg.), eff. Sept. 1, 2017, *available at* <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00762F.pdf#navpanes=0>; <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB01232F.pdf#navpanes=0>. 12

Bill Analysis Accompanying S.B. 762 (85th Leg.), *available at* <http://www.capitol.state.tx.us/tlodocs/85R/analysis/pdf/SB00762F.pdf#navpanes=0>. 13

Secondary Resources

Dictionary.com. 3 n.2, 4 n.3-5

Kroker, Kenton. “Psychology.” *History of Modern Science and Mathematics*, edited by Brian S. Baigrie, Charles Scribner’s Sons, 2002, Science in Context, galegroup.com/apps/doc/K2641500270/SCIC?u=txshrp200874&xid=f87d5f01. Accessed 11 July 2017. 9

No. PD-0712-16

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

ROBERT MONTE PRICHARD,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Dallas County

* * * * *

**STATE PROSECUTING ATTORNEY'S
MOTION FOR REHEARING**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

“Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.” *Bruno v. Milwaukee County*, 660 N.W.2d 656, 663 (Wis. 2003). Ambiguity does not arise simply because opposing parties and judges can conjure up two different arguments about a statute’s meaning. That is simply the very nature of litigation engineered by talented and creative counsel. True ambiguity should require

more than skilled rivalry,¹ otherwise the most fundamental rule of statutory construction—adhering to the plain text—is meaningless and would, in violation of separation of powers, give disagreeable appellate courts the authority to legislate. Cognitive dissonance is not ambiguity.

¹ This Court is not the only court to struggle with drawing the line between true ambiguity and contrary good-faith arguments. The Supreme Court of Wisconsin aptly discussed the error of declaring ambiguity in the latter situation:

Of course judges qualify as ‘reasonably well-informed persons.’ So do lawyers. But a disagreement between judges and lawyers about the plain meaning of a statute or ordinance does not always or even generally mean that the statute or ordinance is ambiguous. If it did, then no statute or ordinance disputed in the courts could ever be given its plain meaning, because all statutory or ordinance language would be considered ambiguous.

Bruno, 660 N.W.2d at 661. The court offered the following guideline:

[T]he court examines the reasonableness of the interpretation, not the general reputation for reasonableness of the person offering the interpretation. Only if there is more than one reasonable interpretation (not more than one interpretation offered by persons generally regarded as reasonable), is there ambiguity. It is the interpretation’s reasonableness that counts, not the interpreter’s status as a reasonable person.

Id. at 662.

GROUND FOR REHEARING

This Court infringed upon the Legislature's prerogative in holding that a deadly weapon finding cannot be made in cases in which a person kills an animal in violation of Texas Penal Code Section 42.092. This extra-judicial assertion of authority has severe consequences for the offense of cruelty to animals beyond the deadly weapon suitability issue.

ARGUMENT

- 1. Does the cruelty to non-livestock animals statute authorize convictions for killing insects? Certainly not, despite the Court's indication that it does.**

The alarming “any living organism” and “even fly or mosquito” illustrations in connection with Section 42.092 are simply wrong. Slip Op. at 11, 19. But what is more alarming is that this wrong has even greater, harmful consequences on the construction of the offense of cruelty to non-livestock animals itself. Let's begin by reconsidering the statute's use of “animal.” “Animal” “means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.” TEX. PENAL CODE § 42.092(a)(2).

Dictionary definitions are helpful to discern the Legislature's intent. “Creature” is defined as an “animal, especially a non-human.”² And “animal” is defined as:

² Dictionary.com, *last visited* July 10, 2017.

any member of the kingdom Animalia, comprising multicellular organisms that have a well-defined shape and usually limited growth, can move voluntarily, actively acquire food and digest it internally, and have sensory and nervous systems that allow them to respond rapidly to stimuli: some classification schemes also include protozoa and certain other single-celled eukaryotes that have motility and animallike nutritional modes.³

Importantly, the Legislature modified both terms with “domesticated.” In the context of “animals” that term means: “to convert (animals, plants, etc.) to domestic uses; tame; to make (an animal), especially by generations of breeding, to live in close association with human beings as a pet or work animal and usually creating a dependency so that the animal loses its ability to live in the wild.”⁴ “Domesticated” also regulates “wild living creature previously captured.” By virtue of its capture,⁵ the animal is now dependent on its human to supply its basics needs that it would otherwise have to satisfy on its own. The scope of its dependency is determined by its capturer, and once that dependent relationship is established, the animal will be unable to resume living in the wild.

The contextual refinement of “animal” precludes reading the plain text to encompass “fly or mosquito.” And the inclusion of flora is even more outlandish.

³ *Id.*

⁴ *Id.*

⁵ “Capture” is defined as: “to take by force or stratagem; take prisoner; seize” and “to gain control of or exert influence over.” *Id.*

If the Court's understanding were correct, a person could be prosecuted under Section 42.092 for swatting a fly or mosquito in a cruel manner. In construing the applicability of a deadly weapon to non-livestock animals, the Court has necessarily rendered an absurd interpretation of the *offense* itself. This consequence alone provides reason enough for this Court to grant rehearing. But there is a more serious problem. The Court's advancement of such an unqualified application of the statutory text may invite a challenge for vagueness. *See Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) ("A statute is void for vagueness if it fails to define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement.'").

These significant looming adverse consequences reveal just how irrational the Court's dueling "reasonable person" interpretations are. A reading that yields potentially absurd results cannot be characterized as rational, and thus cannot legitimately support a finding of ambiguity. Instead, the non-absurd, plain language interpretation should prevail. It is unreasonable to speak of deadly weapons with regard to animals that are not illegal to kill. The Court has offered no explanation as to why the State's proposed construction of limiting to whom or what the weapon is "deadly" based on the offense at issue would have unintended absurd results. So

if a deadly weapon finding can be circumscribed by the offense itself to avoid absurd applications, then applying it on a statute-by-statute basis here is not a precedential departure of catastrophic proportions. *See* SPA’s Brief, at 13-14 (explaining that “others” when the associated felony is DWI would likely be construed to exclude application to animals; “others” could be limited to persons).

2. “Serious Bodily Injury” is now undefined for purposes of Section 42.029.

One basis for the Court’s opinion is that the term “serious bodily injury” (SBI) in the deadly weapon statute and Section 42.092 have “varied meanings.” Slip Op. at 14-16. This should be impossible because both statutes are in the Penal Code; the definition of SBI is provided for by the Legislature in Penal Code Section 1.07(46). If this universal definition of SBI does not apply to Section 42.092, because it somehow has a different meaning from its use in Section 1.07(17)(B), then Section 42.092 has been stripped of its legislatively assigned definition. This may not have been the Court’s intent but it is a consequence of its opinion. If this is the state of the law, then what should the parties and trial court do with jury charges in animal cruelty cases? *See Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015) (“it is generally impermissible to instruct on the meanings of terms that are not statutorily defined”). If the definition of SBI in Section 42.092 is different, then Section 1.07(17)(B)’s definition cannot guide a jury in assaying guilt. The only alternative

would be to allow the jury to implement its own common understanding and apply dictionary definitions for “serious,” “bodily, and “injury” on appeal when reviewing sufficiency. *See id.* (“although an appellate court may articulate a definition of a statutorily undefined, common term in assessing the sufficiency of the evidence . . . a trial court’s inclusion of that definition in a jury charge may constitute an improper comment on the weight of the evidence.”). Again, the Court’s decision will likely fundamentally alter the law, in contravention of legislative license, in animal cruelty prosecutions.

3. The offense elements do not negate the applicability of a deadly weapon finding.

That the offense itself has additional elements (apart from the deadly weapon definition elements), *see* Slip Op. at 16-17, has no bearing on the matter. The applicability of a deadly weapon finding to DWI, arson, and robbery offenses is not precluded, even though those offenses have additional, different elements.

The difference in victim identity (“interests at stake” Slip Op. at 14) is also irrelevant. The Legislature exercised its judgment and determined that those “interests” are worthy of protection. The criminalization of certain acts committed against animals provides irrefutable evidence of this fact. That specific acts are expressly excluded from the statute’s reach does not undermine the offenses defined. Would statutory exceptions to offenses involving death or SBI to people somehow

invalidate the offenses themselves, as the Court suggests? No. In fact, with “person” crimes, there are things similar to the exceptions. They are called defenses and justifications: “Insanity,” “Mistake of Law,” “Mistake of Fact,” “Duress,” “Entrapment,” “Necessity,” “Self-Defense,” “Deadly Force in Defense of Person,” “Defense of Third Person,” “Protection of Live or Health,” “Deadly Force to Protect Property,” and “Protection of Third Persons Property.”⁶ Globally marginalizing the protection of animals provides little justification for rejecting the State’s well reasoned interpretation of the relevant statutes.

4. The Court improperly supplanted the Legislature’s value judgment.

As Judge Yeary pointed out, the Court’s problem stems from a perceived limitless breadth of the deadly weapon provision, as though the Legislature could not have possibly intended additional penalties for animal cruelty. The statute’s existence proves they are a protected class. In the legal realm, there is nothing “unusual” about referring to an animal as having SBI, ““serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.””⁷ See Slip Op. at 12. That the statute uses SBI should place its relation

⁶ This is a mere sampling from Penal Code Chapters 8 and 9.

⁷ If the Court is referring to the usage among the populous, then it would certainly be out of the ordinary for people to discuss injuries to persons in this
(continued...)

beyond debate. Nor is it unusual to refer to an animal as having “physical pain, illness, or impairment of physical condition.” *See id.* All of these physical maladies can be experienced by the animals covered by Section 42.092. What is “unusual” is the interjection of the Court’s own normative judgment.

Also peculiar is the Court’s purported expert opinion that “it is extraordinarily unlikely that an animal would comprehend the significance of a deadly weapon in its interaction with a person.” Slip Op. at 24. When physical harm is inflicted, the “significance” to the animal would register due to the inherent nature of the offense. And even before physical harm occurs, the “significance” is not always unascertainable. “Pavlovian Response” is a term coined after Ivan Pavlov’s study on dogs using classical conditioning scientific methodology. *See* Kroker, Kenton. “Psychology.” *History of Modern Science and Mathematics*, edited by Brian S. Baigrie, Charles Scribner’s Sons, 2002, Science in Context, galegroup.com/apps/doc/K2641500270/SCIC?u=txshrp200874&xid=f87d5f01. Accessed 11 July 2017. Pavlov conditioned dogs to have a reflexive response to certain stimuli. In cases in which an animal has previously been abused with a deadly weapon, the imprint of that assault will undoubtedly alert an animal to the

⁷(...continued)
manner as well. Rarely does someone say, “I suffered a protracted loss to my arm.”

weapon's "significance" when the threatened use of that instrument is apparent on a subsequent occasion. In less grim terms, rarely does a dog not get excited when her caretaker picks up her leash? Legislators often consider this type of evidence in crafting and enacting criminal laws to ensure the law will fulfill its intended purpose. *See, e.g.*, Hearings on Tex. H.B. 653 Before the House Committee on Criminal Jurisprudence, 77th Leg. (Apr. 24, 2001) (statement of Missy McCullough, Animal Trustees of Austin, on legislation that made animal cruelty a felony offense, testifying about a chihuahua "petrified of human hands" as a result of prior abuse), *available at* http://tlchouse.granicus.com/MediaPlayer.php?view_id=21&clip_id=7664 at 2:46:24 to 2:48:09. The Court's independent valuation of animals and their capabilities is unsupported by reliable evidence and should not be determinative on a matter within the purview of the Legislature.

Further, the deadly weapon finding rationale (leaving your weapons behind), Slip Op. at 24, is equally applicable here. The use or exhibition of a deadly weapon while committing animal cruelty increases the probability that the animal will suffer greater trauma or injury. If one purpose of this offense is to prevent injury under defined circumstances, then why is it irrational for the Legislature to prevent the exhibition or use when committing the offense? The Court's narrow analysis does not effectuate the legitimate legislative intent evidenced by the fact that a deadly

weapon finding is applicable to all felony cases without exception. *See Whatley v. State*, 946 S.W.2d 73, 76 (Tex. Crim. App. 1997) (“all felonies are theoretically susceptible to an affirmative finding on the use or exhibition of a deadly weapon.”); TEX. PENAL CODE § 12.35(c)(1) (state jail enhancement to third degree felony).

5. This decision is out of step with other courts.

Pennsylvania has a similar deadly weapon provision. It states:

An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual or in the furtherance of the crime: (i) Any firearm . . . whether loaded or unloaded, or (ii) Any dangerous weapon . . . , or (iii) Any device, implement, or instrumentality capable of producing death or serious bodily injury.

204 PA. CODE. § 303.10(a)(2).⁸ In *Commonwealth v. Hackenberger*, construing the plain language of the statute, the Pennsylvania Supreme Court held that it applies when the weapon is used against an animal; it is not limited to persons. 836 A.2d 2, 4-5 (Pa. 2003).

California also has a similar provision. It states:

A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of

⁸ In Texas, a deadly weapon must be used in association with a collateral felony, not when possession is the gravamen of the offense. *Narron v. State*, 835 S.W.3d 643, 644 (Tex. Crim. App. 1992).

that offense.

CAL. PENAL CODE § 12022(b)(1). A California appeals court held that the plain language supports the imposition of a deadly weapon enhancement when the weapon was used against an animal. *People v. Smith*, 150 Cal. App. 4th 89, 94-96 (Cal. App. 4th Dist. 2007). It concluded that limiting it to cases involving persons would result in the unauthorized rewriting of a statute “to conform to an assumed intention which does not appear from its language.” *Id.* at 94 (internal citations omitted).

In line with the documented national trend, Texas’ deadly weapon finding provision should be interpreted to authorize a finding in animal cruelty cases. This reading would also be in accord with the Legislature’s recent determination that such crimes warrant greater punishment and the enactment of an offense prohibiting bestiality. *See* S.B. Nos. 762, 1232 (85th Leg.), eff. Sept. 1, 2017, *available at* <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00762F.pdf#navpanes=0>; <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB01232F.pdf#navpanes=0>.

6. Conclusion

The stakes are high. And they are high in two important ways. First, one tool among the State’s punishment options has been removed. This will undoubtedly hamper its ability to seek harsher sentences against those special defendants who act with a depraved indifference towards the protected class of animals in Section 42.092.

The unconscionables. The immediate impact is seconded by the deterrent and anti-recidivism objectives, which are broader than future acts of animal cruelty. Animal cruelty offenders frequently graduate to committing serious offenses against persons. *See Bill Analysis Accompanying S.B. 762 (85th Leg.), available at <http://www.capitol.state.tx.us/tlodocs/85R/analysis/pdf/SB00762F.pdf#navpanes=0>; Bill Analysis Accompanying H.B. 653 (77th Leg.), available at <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=77R&Bill=HB653>.* It also removes leverage to reach a plea agreement instead of going to trial. Another repercussion is the inevitable appellate and habeas litigation that will follow because of this decision. Both of these foreseeable outcomes will increase demand on an already taxed judicial system.

The second, high-stakes interest is the integrity of the Court's statutory construction jurisprudence. This case will enable courts to bypass a plain language analysis merely because a statute's meaning is contested. And it will empower appellate courts to act as a super majority when they disagree with the Legislature's informed judgment call.

The State reurges its initial construction. It is reasonable, avoids collateral damage to Section 42.092, and does not undermine the plain text of the offense enacted by a majority of our citizens' representatives.

PRAYER FOR RELIEF

The State prays that its motion for rehearing is granted and that this Court reverse its decision and hold that a deadly weapon finding can be made in cases involving cruelty to non-livestock animals.

Respectfully submitted,

/s/ Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,832 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Motion for Rehearing has been served on July 13, 2017, *via* email or certified electronic service provider to:

Hon. Christine Ou
133 N. Riverfront Blvd.
LB 19
Dallas, Texas 75207
christine.ou@dallascounty.org

Hon. Catherine Clare Bernhard
P.O. Box 2817
Red Oak, Texas 75154
cbernhard@sbcglobal.net

/s/ Stacey M. Soule
State Prosecuting Attorney

Courtesy copies have been emailed to:

Hon. Jessica Milligan, Harris County Assistant District Attorney
milligan_jessica@dao.hctx.net

Hon. Eric Kugler, Harris County Assistant District Attorney
kugler_eric@dao.hctx.net

Hon. Belinda Smith, Former Animal Cruelty Section Chief of the Harris County District Attorney's Office
houstonhoney9@gmail.com

Hon. Caitlin Hawks, Director of Litigation, PETA Foundation
caitlinh@petaf.org

Hon. Frances Ortiz, Professor of Law, South Texas College of Law
fortiz@stcl.edu

Hon. Pat Guter
patguter@gmail.com

Hon. Lora Dunn, Director and Senior Staff Attorney, Criminal Justice Program
Animal Defense Legal Defense Fund
ldunn@aldf.org

Hon. David Rosengard, Staff Attorney, Criminal Justice Program Animal Defense
Legal Defense Fund
drosengard@aldf.org

Ms. Beverly Fyfe, Animal Advocate, Dallas Texas
tjfyfe@sbcglobal.net

Hon. Pia Das, Former Harris County Assistant District Attorney
piadas315@gmail.com

Ms. Jan Duncan, Philanthropist
jan@janduncantexas.com

Ms. Tena Lundquist Faust and Ms. Tama Lundquist, Co-Presidents, Houston Pet Set
admin@houstonpetset.org
tama@houstonpetset.org

Ms. Rania Mankarious, Executive Director, Crime Stoppers of Houston
Ms. Nicole Christoph, Deputy Director, Crime Stoppers of Houston
nchristoph@crime-stoppers.org